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No. 98-707

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

v.

RONALD MOCK,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

REPLY BRIEF FOR THE PETITIONER

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The petition in this case poses an important federal question affecting the uniformity of jury award calculations under the Federal Employers Liability Act ("FELA"): Whether the trial court failed to follow settled federal law as established by this Court in *Norfolk & Western Ry. Co.* v. *Liepelt*, 444 U.S. 490 (1980), by refusing to instruct the jury in a FELA action that damages awarded for lost wages must be based on net, after tax wages rather than gross wages. Significantly, respondent does not even remotely dispute petitioner's assertion that under *Liepelt* (1) a jury must subtract taxes on earnings from gross wages in arriving at an award for lost wages under the FELA, and (2) a trial court may not

refuse to use a defendant's "easily understood" instruction to a jury as to how correctly to calculate a damages award in light of certain tax considerations. Instead, respondent argues that the instruction used by the trial court in this case is consistent with *Liepelt*, despite the trial court's express order to the jury that "you should neither add *nor subtract* for income tax when arriving at your verdict." *Central of Georgia R.R. Co.* v. *Mock*, 499 S.E.2d 673, 678 (Ga. Ct. App. 1998) (emphasis added). Moreover, respondent simply hides from the express holding of the court below that "*Liepelt* does not require that income taxes be subtracted in arriving at an award" under the FELA. The straightforward issue before the Court then is whether the trial court's instruction upheld by the court of appeals complied with the mandate of *Liepelt* that the correct measure of damages should be reduced to reflect income taxes not paid. Because the instruction was not faithful to the rule in *Liepelt*, this case is particularly appropriate for summary reversal.

1. Respondent advances several arguments to support his assertion that the trial court's refusal to use petitioner's concise and easily understood jury charge was legally permissible under *Liepelt*. These arguments, however, boil down to the same contention: Because some of respondent's evidence of lost wages was calculated on an after-tax basis, the jury somehow knew that it must award lost wages net of taxes, despite the trial court's explicit direction to the contrary. Respondent's contention is wrong for two reasons. First, respondent's presumption that the jury verdict was calculated on an after-tax basis is not supported by anything in the record. The general verdict provides no basis for determining what the jury did in measuring damages. Second, because the Court must presume that the challenged instruction had a concrete impact on the jury's ability correctly to assess and award damages, the question of the validity of that instruction under *Liepelt* is therefore squarely presented in this case.

Respondent argues that "there is no compelling reason to grant certiorari" because the trial court's jury instruction and receipt of evidence were "in accordance with this Court's decision in [*Liepelt*]." Respondent's argument is merely a conclusory assertion that provides no basis for ignoring the clear holdings below. In the first place, regardless of the evidence, the jury simply was not given correct instructions on what to do with the evidence before it in arriving at an award. Indeed, the trial court expressly ordered the jury not to subtract taxes. Thus, the trial court's charge to the jury did not comply with the primary teaching of *Liepelt* that the vital purpose of FELA instructions should be "[the elimination] from the deliberations of juries 'an area of doubt or speculation that might have an improper impact on the computation of the amount of damages.'" *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486-87 (1981) (quoting *Liepelt*, 444 U.S. at 498).

Second, respondent's characterization of the evidence is misleading. Although respondent's expert made some calculations relying on an after-tax basis, respondent also presented evidence, including W-2s and tax returns, from which both gross wage loss and net wage loss could be calculated.[1] Moreover, in closing arguments, counsel for respondent claimed lost wages of $104,000 gross or $83,000 net. Opp. 4. By ordering the jury *not* to sub-

[1] Even if all of the evidence had been based on after-tax calculations, which it was not, it would still have been possible (and under the jury instruction necessary) for the jury nevertheless to have arrived at an award that did not "subtract" for taxes. *See, e.g., Gwinnett Commercial Bank* v. *C&S Bank*, 262 S.E.2d 453, 456 (Ga. Ct. App. 1979) ("The jury is not compelled to accept the testimony of an expert witness as to value even where there is no other evidence of facts and data upon which the jury might base an independent conclusion."); Tr. 386 ("Even though you're allowed to receive the testimony of experts, you're not bound by such testimony."). Here, of course, the raw numbers were before the jury and it could readily make a pre-tax calculation as required by the judge's instructions.

tract taxes at arriving at an award, the trial court directly instructed the jury to ignore the evidence on after-tax earnings. Moreover, the fact that the trial court correctly explained to the jury that the final award would not be subject to income tax is irrelevant to the court's failure to ensure that the jury derived the lost wages component of its award solely on an after-tax basis. The Court can only assume that the exorbitant $755,000 jury verdict was calculated on the basis of gross earnings as mandated by the trial court's instruction—precisely the result prohibited by *Liepelt*.

Finally, respondent incorrectly argues that "the assumptions of the 'question presented' are untrue" because "there is no basis in the record" for petitioner's statement that the trial court "expressly instructed the jury not to subtract for income taxes in reaching a verdict." The jury instruction could not be plainer: "you should neither add *nor subtract* for income tax when arriving at your verdict." Thus, if the Court agrees with petitioner that *Liepelt* stands for the proposition that "any verdict in favor of the plaintiff for loss of earnings should be calculated on the basis of his net earnings, that is, the earnings left to him after the payment of income taxes," Pet. 4 (quoting proposed jury instruction), then this case provides the perfect vehicle to uphold that rule of law. The trial court erred in refusing to so instruct and the court of appeals compounded the error by affirming.[2]

2. Respondent does not dispute petitioner's interpretation of *Liepelt*; nor does respondent dispute that this case presents an important federal question. See Brief of

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[2] Respondent's reliance on *Ybarra* v. *Burlington Northern, Inc.*, 689 F.2d 147 (8th Cir. 1982), as agreeing with the court below, does nothing but demonstrate that this case is not aberrational and thus further justifies action by this Court. With respect to the dozen cases cited in the petition that conflict with the holdings in *Ybarra* and the courts below, respondent simply ignores them. The conflict among the lower courts thus could not be more stark.

Association of American Railroads as *Amicus Curiae* at 3, 7-9. Thus, the only question is whether this case is appropriate for review by this Court. The very fact that the Georgia Court of Appeals itself chose to issue a written decision determining whether the trial court properly applied the law reveals that the court of appeals believed the question presented here was squarely raised by the jury instruction. Although the court of appeals correctly understood the significance of the question presented, its explicit holding that "*Liepelt* does not *require* that income taxes be subtracted in arriving at an award," *Central of Georgia*, 499 S.E.2d at 678; Pet. App. 9a (emphasis in original), could not be more flatly inconsistent with the holding in *Liepelt*. Moreover, by affirming the trial court's instruction, the court of appeals plainly recognized that the trial court prohibited the jury from subtracting income taxes from lost wages in arriving at an award, which was fully consistent with its own incorrect understanding of *Liepelt*. The Georgia Court of Appeals' misunderstanding of this Court's mandates in *Liepelt* is now the law in Georgia (as well as the Eighth Circuit), and is in direct conflict with the vast majority of federal appellate courts. Therefore, this case presents particularly compelling reasons for the Court, at a minimum, to grant the petition for a writ of certiorari to correct the legal error of the Georgia Court of Appeals. Because there is no dispute between the parties as to the legal principles established in *Liepelt*, this case is also particularly suitable for summary reversal.

CONCLUSION

For the foregoing reasons and those stated in the petition and the amicus brief of the Association of American Railroads, the petition for a writ of certiorari should be granted. The Court may wish to reverse summarily on the basis of *Liepelt*.

Respectfully submitted,

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